Title IX Investigators: Running an Investigation

THE TRUST

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1

Introductions

- Meet your table mates.
- We encourage questions!

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Disclaimer

The information provided in this document is for informative purposes only and should not be used in place of legal advice.

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Learning Objectives

- Review Title IX coverage
- Detail Title IX procedures for Title IX Investigators
- Practical application of procedures to typical Title IX scenarios

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Title IX

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance."

U.S. Congress, 1972

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Tips

- Title IX Packet Resources
  - Templates
- College's Policies/Procedures for Sexual Harassment, Title IX

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Title IX Sexual Harassment or Sexual Violence

- 3 Types in the definition in the regs
- All three require:

Unwelcome sexual conduct

(no consent)

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Conduct effectively denies (or limits) a person's equal access to educational activity

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Review Type 1: Quid Pro Quo

An employee of the College conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct.

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Review Type 2: Severe, Pervasive and Objectively Offensive

Unwelcome conduct, determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school's education program or activity

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Type 3: Sexual Assault or Violence

- Sexual assault as defined in 20 U.S.C. 1092(f)(6)(A)(v)
- Dating Violence as defined in 34 U.S.C. 12291(a)(10)
- Domestic violence as defined in 34 U.S.C. 12291(a)(8)
- Stalking as defined in 34 U.S.C. 12291(a)(30)

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Reminders

- Respondent is presumed not responsible for conduct
- Disciplining Respondent for TIX conduct or conduct directly connected to the TIX conduct = Retaliation
- Both parties must have equal opportunity to present witnesses and evidence

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Advisors

- Parties may have an advisor of their choice
- Advisor may be an attorney, but doesn't have to be

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Parties' Right to Review Evidence

- Have the opportunity to inspect and review evidence collected during the investigation
- Should sign a non-disclosure agreement (NDA), which does not restrict either party's ability to discuss the allegations or gather and present evidence

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Expanding the Investigation

If, during the course of the investigation, additional allegations are brought forward that were not included in the initial notice, alert the Title IX coordinator, who will:

- provide written notice of the additional allegations to the parties
- determine the course of action for the investigation of the addition allegations

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Timelines

- You must meet the timelines set out in your Policy/Procedure
- The investigation must be reasonably prompt (specific number of days for completion of the process must be established)
- Coordinator can determine if temporary good cause delay (College administrative needs ARE NOT good cause for delay)

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Investigator: Requirements

- Must be trained on Title IX regulations
- May be the Title IX Coordinator
- May not be the decisionmaker
- Can be a third party hired for this purpose
- Must not have a conflict of interest

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Pre-planning

- Review Title IX sex discrimination and what elements must be established
  - Quid Pro Quo
  - Severe, Pervasive, Objectively Offensive
  - Sexual Violence
- Review the allegations made in the particular matter

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Planning

- Documents?
  - Student/staff records?
  - Server search?
  - Recordings from surveillance cameras?
  - Police report?
- Interviews
- Understand disabilities of persons involved?
- Need an interpreter?

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Physical Evidence to Consider

- Attendance records (if kept in course) and class schedules
- Discipline records
- Medical or counseling information
- Social media
- Screenshots
- Videos
- Compromising evidence (nude photos/videos) should be redacted and summarized

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Note re: Sexual History

The Complainant's sexual predisposition and prior sexual behavior are not relevant, unless:

- It is needed to prove that someone other than the Respondent committed the conduct alleged
- Specific incidents of the Complainant's prior sexual behavior with the Respondent are needed to prove consent

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Activity

Plan Investigation

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Collecting Evidence

- Do not require or rely on the parties to anticipate and provide you with the evidence you need. You may not require a party to provide evidence (documentary or verbal) that would be legally protected under attorney-client privilege, doctor-patient privilege, or spousal privilege.

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Collecting Evidence

- If the parties want to provide otherwise privileged information, you must obtain written, voluntary consent (of parent or adult student) allowing the College to include that evidence (see forms for a template)
- **Even if the College has the medical evidence, it may not be used in the investigation without consent**

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Interview Notice

- For all interviews, provide written notice of interview: date; time; location; participants; and purpose of any investigation activity that requires a **party's presence**—provide notice with enough time for the party to prepare to participate
- See forms for template

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Preparing Questions

- Plan your interview outlines (checklists in forms may be helpful)
  - Go with the flow
  - To the extent reasonable, ask both parties the same questions and then allow the interview to take you down different roads
  - Ask witnesses the same or similar questions

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Style

- Avoid putting words in mouth of witness
  - ASK: "How did ____'s behavior make you feel?"
  - DON'T ASK: "Did ____'s behavior upset you?"
- Avoid "why" questions
- Avoid conclusion questions
- Avoid compound questions

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Setting the Stage for the Interview

- Summarize Title IX
- Explain process
- Share purpose
- Give the organization's need
- Establish credibility
- Explain investigator role

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Interview

- Plan location—private, safe, comfort (tissues)
- Sense of formality
- Reassure no retaliation for participating
- Caution confidentially to both parties and the College
- Put interviewee at ease/develop rapport
- Remember you are wearing your investigator hat

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Explain Expectations

- Recording by parties
  - you can decide whether you will allow or not
  - realistically can't control
- Tell the truth
- Rules for advisors
- Virtual interview—confirm who is present

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More Expectations

- Explain that they do not have to provide evidence protected by privilege (and if you use confidential information, you will need consent to disclose)
- Explain that no one may threaten, intimidate, or harass anyone who participates in the process

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Questioning Pitfalls

- Arguing or becoming angry
- Showing personal prejudice
- Lying
- Hurrying (plan your schedule carefully)
- Interrupting
- Making assumptions
- Being dismissive
- Making promises

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Questioning Pitfalls, cont.

- Losing track of elements of definition
- Leading questions: "When you touched her arm, did you . . ."
- Putting too much value on inconsistencies or irrelevant information
- Accepting one-word responses
- Phrasing things negatively

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Questioning Techniques

- Monitor witness's (and parent's) body language
- Take notes
  - Slows process
  - Provides reflection and reference
  - Make sure that you get an answer
- One question at a time
- Wait for a response—do not feel need to fill the silence.

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Open-Ended Questions

- "Explain what happened in the Math course"
- "What are some experiences you have had with..."
- Paraphrase/summarize back
- Start broad and narrow down
  - "Tell me more about..."
  - "What are some other details?"

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Nearing end...

- Ensure the pertinence and accuracy of information
- Ask if there is anything else
- Every time more information is given, ask again if there is any else
- Ask if there are others with whom you should speak
- Share relevant evidence or documents

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Closing Interview

- Reassure if any concerns raised
- Ask to contact later if something comes to mind
- Inform you may be in touch if you need more information
- Thank and express empathy for their time and cooperation
- Provide your contact information

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Closing Interview of Parties

- When you expect concluding interviews and will send evidence
- Give non-disclosure agreement
  - May sign now or return later, before evidence disclosure
- If you do not receive signed NDA, only provide access to review of documents
  - Notify them that access will be facilitated by the Title IX Coordinator and provide contact info

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Activity

Mock Interview
(Optional)

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Investigation Tips

- Keep written documentation of all communications
- Update the complainant and respondent periodically as to progress/status (not insight or details of the investigation)—your Title IX Coordinator may do this
- When possible, copy both parties **separately** on responses or when informing the other party

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Investigation Tips

- The need to delay: Notify the Title IX coordinator who will notify both parties of Good Cause Delay
- Report possible crimes to Title IX Coordinator and law enforcement (e.g. threats or photos)
- Report any additional non-Title IX concerns to HR or relevant Dean/Admin.

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Good Cause Delay Reasons

- Concurrent law enforcement activity
- Witness unavailability
- Illness
- School breaks
- Absence of a party or party's advisor
- Need for language assistance or ADA accommodations
- Overburdened school administrators (true!) is not good cause

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Let Title IX Coordinator Know

- Additional Supportive Measures are needed or need to be modified
- Additional allegations that were not included in the initial notice
- New mandatory or permissive dismissal comes to light
- Informal Resolution—if wanted by either party
- Expansion of investigation

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Sharing Evidence with Parties

- Form for notice
- Not your personally created reference materials to complete the report (e.g. personal notes)
- Information that will go into the report for the decision-maker
  - Statements
  - Summaries of interviews
  - Documents
  - Records

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Redactions

- Check with Title IX Coordinator regarding redaction of witness names
- Must redact information protected by privilege unless there is written consent
- May redact information in the evidence that is not directly related to the allegations
- May not redact confidential information that is directly related and relevant

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Evidence Sharing with NDA

- Send the signed NDA with evidence
- Provide parties an equal opportunity to access evidence gathered as part of the investigation that is ***directly related*** to the allegations raised in the complaint
- Send the evidence to the party and their advisor and provide at least 10 days for them to submit a written response

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Evidence Sharing - No NDA

- Inform Title IX coordinator
- Provide opportunity for physical review of evidence
  - Notify them of their right to access the evidence to review
  - Notify them how they can do this – contacting the Title IX Coordinator
- No copies or photographs of evidence permitted

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Additional Evidence

- The Title IX Coordinator will decide whether parties must provide all evidence PRIOR to the disclosure of evidence for review has been provided by the investigator OR whether to allow parties to provide additional evidence after disclosure evidence has been shared

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Review Written Responses

- Consider the written responses to be evidence provided by the parties and address in the report
- Consider additional evidence shared after initial disclosure (if allowed)
- Questions submitted for other party should be given to the decision-maker to manage, but noted in your report
- See form for Notice of Party's Written Response to the Evidence

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Investigation Report

- Be thorough
  - In interview summaries, include observations of witnesses—report on credibility
  - Details and witness observations
  - If you were the decision-maker, what would you NEED to know?
- Decision-maker should not need to contact investigator for clarification

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Report Submission

- Email to Title IX coordinator
- Email separately (read receipt) to both parties and copy Title IX coordinator on each and/or mail hard copies
- Send at same time
  - Scheduled/delayed sends are very helpful for this in Outlook, Gmail, etc.

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Activity

Review and Discuss Investigation Report

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After Report is Submitted

- Each party has at least 10 days to review the investigation report and provide a written response prior to the hearing
- You can decide whether to allow additional time or limit it to 10 days
- Decision-maker will consider the written response in addition to the investigation report

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52

Questions?

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53

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54

Title IX Investigator Training

Case Study: Trust Community College Incident

Case Study Overview

Background:

Trust Community College received a complaint from Topanga, age 20, alleging Topanga is being sexually harassed by her teacher, Stuart, age 30. Stuart teaches Moral Philosophy, a required course for Topanga's program. Topanga is a good student in the course and often participates in lectures. The course has an assignment to write a paper, which Topanga completes. One day after the lecture, Stuart is at the student union socializing with a large group of students, including Topanga, and playing pool. He steps away across the union to buy coffee, and Topanga follows. In their discussion, he quotes her paper, which she is flattered by, but also critiques a portion and says they'll "go over it." He casually asks her how campus life is and, in her response, she references the name of the dorm she resides in.

One evening, Stuart spontaneously shows up at Topanga's dorm room where she and her roommate, Angela, are hanging out. Stuart has a folder with Topanga's paper and offers to discuss it with her. Angela leaves the room to go to the union where Topanga says she will meet her soon. Topanga sits on the bed and Stuart sits at the desk where he provides feedback on her paper, the topic was on morality and ethics. Stuart gets up to sit on the bed next to Topanga. In the context of discussing morality and ethics he says "I'm sitting here with you, I'm your teacher and I find you attractive but we're talking about the assignment. Have we crossed the line?" Topanga says no. Then Stuart says "I'm your teacher and I find you attractive, but now we're not talking about your paper. Have we crossed the line?" Confused, Topanga says, "what?" Stuart moves closer to her and grabs her hand which is resting on her leg. He then says, "I think about you and I'd like to see you more than just on Tuesdays and Thursdays." Stuart tells her they're adults and he'd like to get to know her better and says "that's what I'm gonna do" as he reaches out to touch her hair. Topanga tells him he is making her uncomfortable, and she wants him to leave. Stuart responds, "That's not what you want" and the Corey appears in the doorway interrupting their conversation.

The Title IX Coordinator provides a Title IX Complaint form to Topanga and explains the process of how to file a complaint. The Title IX Coordinator has assigned you as the investigator.

Allegation as Listed in the Complaint:

1. Topanga (Complainant) alleges that Stuart (Respondent) came to her dorm room and hit on her by making comments that he is attracted to her.
2. Topanga (Complainant) alleges that Stuart (Respondent) came to her dorm room and touched her hand, which was on her leg, and touched her hair, in a way that made her uncomfortable because it was in a sexual manner.

Key Facts:

- The report was initially made on April 5th. The Title IX Coordinator met with Topanga to obtain preliminary information, explain the grievance process, and offered supportive measures.
- A formal complaint for Title IX was submitted April 8th.
- The Written notification was provided to the parties, including your assignment as investigator, on April 11.
- Date Range of Alleged Incidents: unclear, but at least one incident at the end of March/early April.
- Topanga (Complainant) is 20-year-old female student who has been enrolled in the Moral Philosophy course taught by Stuart since January.
- Topanga is dating Corey, who is also enrolled in the course.
- Topanga lived in student housing on campus.
- Stuart has taught at the College for many years and often hangs out socially with students on campus in the student union, playing pool with them, etc. These are always in public with many of his students present, including Corey, Shawn, Eric, Angela, and others. Students tend to like Stuart and think he is "cool" and not a typical professor.
- The next day, Corey saw Stuart in the student union and asked to speak to him outside. The contents of the conversation are unknown at this time.

Planning your Investigation:

1. **Review the Complaint: Carefully** review the allegations from Topanga and the facts provided.

    - Which definition(s) under Title IX might the alleged conduct fall under?

    - What are the elements of that definition?

2. **Evidence: Part** of your investigation involves collecting and reviewing evidence to either support or refute the allegations.

    - What evidence will you request/gather?

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    - What is your reason for each piece of evidence?

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3. **Interviews:**

- Who will you interview? (Bullet points are for guidance and not indicative of a specific number of interviewees).

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- Your objective in the Complainant's interview is to provide Topanga an opportunity to explain what happened to her and the effect it had on her. What are some questions you will ask the Complainant and/or information you seek to get from her?

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- Your objective in the Respondent's interviews is to provide Stuart an opportunity to respond to the allegations against him and explain his perspective on what happened. What are some questions you will ask the Respondent and/or information you seek to get from him?

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- Your objective in interviewing Witnesses is to gather additional perspectives from others who may have observed relevant interaction or have relevant information

about the allegations. What are some questions you will ask the Witnesses and/or Information you seek to get from them?

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